counsel were outside the wide range of professionally competent assistance, nor has he shown that the justice of his sentence was indeed unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. Burger v. Kemp, 483 U.S. 776, 795-796 (1987).

In conclusion, this Court finds that petitioner's counsel effectively and competently represented him, that counsel's performance in no way prejudiced the petitioner. Further, this Count finds that defense counsel's performance was well within the range of professionally competent assistance. For these reasons, the petition for Post-Conviction Relief is denied.

DATED this 14th day of April, 1992.

DISTRICT JUDGE

REX BELL
DISTRICT ATTORNEY
Nevada Bar #001799
Nevada Bar #003901

BY: Teresa Lowry
TERESA LOWRY
Deputy District Attorney

mmw

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Attorney for Appellant, JIMMIE DAVIS

FILED

APR 16 3 57 PM '92

DISTRICT COURT

CLARK COUNTY, NEVADA

JIMMIE DAVIS, Appellant, vs. STATE OF NEVADA, Respondent.	CASE NO. C 85078 DEPT. NO. IV DOCKET NO. "C"

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AMENDED NOTICE OF APPEAL

TO: THE STATE OF NEVADA, Respondent; and

TO: REX BELL, DISTRICT ATTORNEY, its Attorney:

NOTICE IS HEREBY GIVEN that JIMMIE DAVIS, presently incarcerated, hereby appeals to the Supreme Court of the State of Nevada, from an Order denying defendant's petition for post-conviction relief entered by the Honorable Addeliar D. Guy, District Court Judge, in the above-entitled matter on or about March 25, 1992, and the Findings of Fact and Conclusions of Law and Order entered on or about April 15, 1992.

Respectfully submitted this 16 day of April, 1992.

By Mark B. Bailus

MARK B. BAILUS, ESQ.
Nevada Bar No. 002284
600 South Eighth Street
Las Vegas, NV 89101
Attorney for Appellant DAVIS

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am an employee of the LAW OFFICES OF CHERRY & BAILUS, and that on the 16th day of April, 1992, I deposited for mailing at Las Vegas, Nevada, a true and correct copy of the above and foregoing NOTICE OF APPEAL addressed as follows:

REX BELL, DISTRICT ATTORNEY
200 South Third Street
7th Floor
Las Vegas, NV 89155

FRANKIE SUE DEL PAPA, ATTORNEY GENERAL
State of Nevada
State Mailroom Complex
Las Vegas, NV 89158

SUPREME COURT CLERK
STATE OF NEVADA
State Capitol Complex
Carson City, NV 89701

PEGGY J. SIGLER, An Employee of
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ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * *

FILED

JAN 07 1993

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

JIMMIE DAVIS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. 23338

APPELLANT'S OPENING BRIEF

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Statutes Cited

Federal Cites

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STATEMENT OF THE ISSUES

1. Whether Appellant's plea of guilty was freely and voluntarily given, and thus, whether said plea of guilty should be set aside.

2. Whether Appellant was denied his constitution right to effective assistant of counsel.

3. Whether the District Court Judge erred in denying Appellant an evidentiary hearing on his petition for post-conviction relief.

STATEMENT OF THE CASE

By way of Information, Appellant, JIMMIE DAVIS (hereinafter "Appellant"), was charged with MURDER WITH USE OF A DEADLY WEAPON, a violation of Nevada Revised Statutes (hereinafter "NRS") 200.010, 200.030, 193.165; and ROBBERY WITH USE OF A DEADLY WEAPON, a violation of NRS 200.380, 193.165. On September 12, 1988, Appellant entered a plea of not guilty to the above-mentioned charges and the matter was set for jury trial.

On October 12, 1988, Appellant pled guilty, pursuant to plea negotiations, to Count I of the Information, charging him with MURDER WITH USE OF A DEADLY WEAPON, a violation of Nevada Revised Statutes (hereinafter "NRS") 200.010, 200.030, 193.165, before the Honorable Earl W. White, District Court Judge, in and for the Eighth Judicial District Court for the County of Clark, State of Nevada. Further, as part of the plea negotiations, Count II of the Information was dismissed and the State and Appellant stipulated to the degree of murder and the penalty to be imposed, specifically, life without the possibility of parole.

On December 12, 1988, Appellant's sentencing hearing was

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conducted, at which time the District Court Judge imposed a sentence of life without the possibility of parole.

On January 17, 1990, Appellant filed a proper person petition for post-conviction relief. Thereafter, the District Court Judge appointed counsel in this matter and supplemental points and authorities were filed in support of Appellant's petition for post-conviction relief. On March 25, 1992, the District Court Judge, having heard argument in support of and opposition to Appellant's petition for post-conviction relief and/or request for evidentiary hearing, denied same.

On April 3, 1992, Appellant filed a timely Notice of Appeal. Said appeal is currently pending before this Court.

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STATEMENT OF THE FACTS

Appellant appeared before the Honorable Earl W. White, District Court Judge, on October 12, 1988 and responded affirmatively to the question of his desire to withdraw his former plea of not guilty and plead guilty, pursuant to negotiations, to Count I of the Information, charging him with Murder With Use of a Deadly Weapon (NRS 200.010, 200.030, 193.165) (ROA 117-119). Judge White inquired of the Appellant whether he discussed this matter with his attorney and whether his plea was freely and voluntarily given. Appellant responded "Yes" to the foregoing (ROA 119-120). Further, Judge White inquired of the Appellant whether anybody had threatened him or anybody closely associated to him made Appellant plead guilty. In response to said question, Appellant answered, "No" (ROA 120). Judge White also questioned Appellant whether anybody had promised him leniency or special treatment to get Appellant to plead guilty. Appellant answered, "No" (ROA 120).

Judge White then advised Appellant of his Fifth and Sixth Amendment rights to which the Appellant responded that he understood and was willing to waive same (ROA 120-121).

Thereafter, the following colloquy occurred (ROA 121-123):

> THE COURT: Are you pleading guilty because in truth and fact you are guilty?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Would you tell me then what happened on July the 31st that causes you to plead guilty this morning to murder in the first degree.
>
> THE DEFENDANT: The young lady came to sell a gun in an apartment on Britz Circle or whatever. She came in, she set the gun on the counter. She asked me if I would pay $400 and I picked up the gun and I told her why $400 and she told me she had bullets for the gun too. She gave me the bullets, I loaded the gun. I cocked the trigger, pointed the gun at her and told her to lower the price. She didn't lower the price to 75 and as I put the gun down -- as I closed the trigger the gun shot.
>
> MR. HENRY: Your Honor --
>
> MR. GIBSON: He's not finished, Mr. Henry.
>
> THE DEFENDANT: And the gun shot. Before the gun shot she asked 75 and I was trying to get the gun for nothing and I was trying to keep the gun -- from her retrieving the gun from me which it was hers at first.
>
> THE COURT: Mr. Henry.
>
> MR. HENRY: Your Honor, if I might. The defendant I believe the day after he committed this crime in the presence of his uncle and after having been given his Miranda rights by a North Las Vegas detective made a written statement what he said, as I recall he said that the victim Brittain Gelabert came in and offered to sell him a gun, a pistol, a revolver for a hundred dollars; that she took the pistol out and put it on the counter in front of him; out of her purse -- she took the bullets out of her purse and laid them down. That he picked up the pistol, opened the cylinder, loaded it with the bullets, closed the cylinder, cocked the gun, put his finger on the trigger guard above the trigger and pointed it at her. She said she wanted a hundred dollars. He told her to get out. She said again she wanted a hundred dollars. He told her to get out.

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> The detective asked him, "When you were pointing the cocked pistol at her did you want to get the pistol from her without paying anything?" He said yes, and it was after he formed this intent that he would get the pistol from her without paying anything by pointing the cocked pistol at her that the pistol went off, shot her and she died as a result of that and I believe he would agree to this statement of the facts.
>
> THE DEFENDANT: Yes.

Judge White thereafter accepted the admission of Appellant and found that Appellant's plea was made "freely and voluntarily" with the full understanding of the charge against him and the consequence of the admission (ROA 124).

ARGUMENT

I.

APPELLANT'S PLEA OF GUILTY WAS NOT FREELY AND VOLUNTARILY ENTERED, AND THUS, SHOULD BE SET ASIDE

Appellant submits, and the record supports, that the guilty plea herein should be set aside because the record does not affirmatively demonstrate it was knowingly and voluntarily entered. See, **Russell v. State**, 99 Nev. 264, 265, 661 P.2d 1292 (1983).

In **Higby v. Sheriff**, 86 Nev. 774, 476 P.2d 959 (1970), the Nevada Supreme Court incorporated the principles enunciated by the United States Supreme Court in their decision, **Boykin v. Alabama**, 395 U.S. 238 (1969), that where a plea of guilty is accepted, the "record should affirmatively show" that certain "minimal requirements" are met. Generally, said minimal requirements are as follows:

> (1) An understanding waiver of constitutional rights and privileges;
>
> (2) An absence of coercion by threat or promise of leniency;

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(3) An understanding of the nature of the charge, itself, i.e., the "elements" of the offense;

(4) An understanding of the consequences of the plea, and the range of the punishments which may be imposed.

The above-stated requirements have been codified in NRS 174.035(1), which provides, in pertinent part:

> The court may refuse to accept a plea of guilty, and shall not accept such plea...without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and consequences of the plea. [Emphasis added]

After a careful evaluation of the record herein, it is apparent that it is utterly void of any indication that Appellant understood the elements of the murder charge. Further, the record is barren that Appellant was ever explained of any defenses available to him.

The Court in **Higby**, **supra**, quoting from **McCarthy v. United States**, 394 U.S. 459 (1969), in adopting the United States Supreme Court's rationale of rigid adherence to Rule 11 of the Federal Rules of Criminal Procedure, stated:

> First, although the procedure embodied in Rule 11 has not been held to be constitutionally mandated, it is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntarily. Second, the Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination. Thus, the more meticulously the Rule is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas.

86 Nev. at 779, quoting 395 U.S. at 465.

Concluding, the Court in **McCarthy** stated:

> Our holding that a defendant whose plea has been accepted is violation of Rule 11 should be afforded the opportunity to plea anew not only will insure that every accused is afforded those procedural safeguards, but also will

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> help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged and are more difficult to dispose of, when the original record is inadequate. It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking.

394 U.S. at 472; see also, 86 Nev. at 779-80.

> ...The United States Supreme Court recalled in Henderson the long-accepted principle that a guilty plea must provide a trustworthy basis for believing that the defendant is in fact guilty. Thus, the "constitutional rule relevant" to such cases is "that the defendant's guilt is not deemed established by entry of a guilty plea, unless he either admits that he committed the crime charged, or enters his plea knowing what the elements of the crime charged are."

97 Nev. at 134.

After carefully reviewing the canvassing by the court of the Appellant, it is clear there was no discussion as to the "elements" of murder, or any other crime. Further, the record is barren as to what, if anything, was explained concerning the elements of the crime, or whether Appellant actually understood what was explained.[1]

A similar scenario occurred in **Hanley v. State**, 97 Nev. at page 134, wherein the Court observed:

> There was no mention of murder in the first degree or any other crime in this portion of the canvassing; there was no mention of the "elements" of first degree murder or any other crime; there was no statement as to what, if anything, was explained, nor what, if anything, the

[1] Close scrutiny of the record herein reveals that it is barren of any indication that trial counsel explained to Petitioner the principles of the "felony-murder" rule and how it may be applicable to Petitioner's case. Such is important in light of the fact that during a colloquy between the prosecutor and the court at the plea hearing, it appears the prosecutor relied upon the "felony-murder" rule as the underlying basis for the court to accept Petitioner's plea.

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> defendant understood as a result of such explanation. As a showing that defendant under the stated circumstances knew or understood what the elements of the crime he was pleading to were, the record is completely deficient.
>
> * * * *
>
> Although we have disclaimed the necessity for "articulation of talismanic phrases", Heffley v. Warder, 89 Nev. 573, 516 P.2d 1403 (1973), in plea hearings and have declined to "impose upon our trial judges the rigid requirements imposed upon federal judges when pleas are taken under Federal Rules of Criminal Procedures, Rule 11, Wynn v. State of Nevada, 96 Nev. 673, 615 P.2d 946 (1980), we would hold that constitutional requirements and the statutory requirement of NRS 174.035(1) demand either a showing that the defendant himself (not just his attorney) understood the elements of the offense to which the plea was entered or a showing that the defendant, himself, has made factual statements to the court which constitute an admission to the offense pled to [Emphasis added]

Based on the foregoing, it is obvious that there was no adequate showing that the Appellant understood the particular charge he pled guilty to, and specifically, that he understood the elements of the crime of murder.

Since the Information was never read to Appellant on the record, and there is absent from the record the necessary affirmative showing that Appellant understood the nature of the offense to which he was pleading, Appellant's plea of guilty should be set aside. See, **DeBose v. State**, 100 Nev. 339, 682 P.2d 195 (1984); and **Sigler v. Director of Nevada State Prisons**, 97 Nev. 221, 625 P.2d 275 (1981).

II.

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Appellant submits that he was denied his Sixth Amendment right to effective assistance of counsel.

It is axiomatic that Appellant under the Sixth Amendment was

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guaranteed the right to the assistance of counsel for his defense, even though he lacked funds for counsel. See, **Gideon v. Wainwright**, 372 U.S. 335, 83 S.Ct. 792 (1963). Further, the right to effective and competent assistance of counsel for the right given is not just formal, but a substantial right. See, **Powell v. Alabama**, 350 U.S. 85, 76 S.Ct. 167 (1955).

The traditional standard in Nevada to measure counsel's conduct to find ineffective assistance of counsel was to determine whether counsel's representation was of such a low caliber as to reduce the proceedings to be a "sham, farce, or mockery." See, **White v. State**, 95 Nev. 159, 591 P.2d 266 (1979).

Such is no longer the standard in Nevada. The appropriate standard used to determine effectiveness of counsel is stated in **Warden v. Lyons**, 100 Nev. 430, 683 P.2d 504 (1984), whereby the Court expressly adopted the "reasonably effective assistance" standard enunciated in **Strickland v. Washington**, 104 S.Ct. 2052 (1984):

The United States Supreme Court has recently adopted the "reasonably effective assistance standard for ineffective counsel in criminal cases. This constitutional standard supplanted Nevada's traditional 'farce and sham' test.: See, **Strickland v. Washington**, 466 U.S. 668, 52 U.S.L.W. 4565 (May 14, 1984).

In **Strickland v. Washington**, **supra**, the Court stated:

> The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases -- that is, those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we must take its purpose -- to ensure a fair trial -- as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied

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on as having produced a just result. **Strickland v. Washington**, **supra**, at 2064.

* * *

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Recently, in **Wilson v. State**, 105 Nev. 110, 112, 771 P.2d 583 (1989), the Court concluded:

> In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court defined standards for a defendant's Sixth Amendment right to effective assistance of counsel. The Court described two components of a showing of ineffective assistance of counsel in the context of a murder conviction or death sentence. First, the accused must show that counsel's representation fell below an objective standard of reasonableness. Id. at 687.
>
> In order to prove prejudice, the accused must show that there is a reasonable probability that, but for counsel's mistakes, the result of the proceeding would have been different. Id. at 694.

The foregoing is in accord with the standard adopted by the Ninth Circuit in **Cooper v. FitzHarris**, 586 F.2d 1235 (9th Cir. 1978), cert. denied, 440 U.S. 974 (1979).

> Defense counsel's errors or omissions must reflect a failure to exercise the skilled judgment or diligence of a reasonably competent criminal defense attorney; they must be errors a reasonably competent attorney acting as a diligent conscientious advocate would not have made.

After a careful review of the record, it is apparent that Appellant's trial counsel did not expend the time and/or energies

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necessary to prepare pre-trial motions and/or a meaningful defense, nor conduct "a reasonably substantial investigation" into a plausible line of defense. Specifically, trial counsel failed to investigate and/or interview certain witnesses who would have testified that the shooting was accidental and not intentional. Specifically, law enforcement officers took the statement of one, Arthur Collins, a percipient witness to the shooting, who, in his statement, exonerated Appellant by stating that the shooting was unintentional (ROA 52-54). Also, another percipient witness, one, John Harvey, made a statement to law enforcement officers which seemed to exonerate Appellant (ROA 647).

Further, trial counsel failed to file pre-trial motions on behalf of Appellant prior to his change of plea. Close scrutiny of the record reveals that Appellant, who was sixteen (16) years old, was interrogated by law enforcement officers regarding the shooting of Brittain Gelabert (ROA 31-35). There was several grounds trial counsel could have moved to suppress Appellant's statement: (1) the confession should have been suppressed because law enforcement officers interrogated Appellant, who was only sixteen (16) years old, with his parents not being present.[2] See, **Marvin v. State**, 95 Nev. 836, 603 P.2d 1056 (1979); (2) Appellant was not advised that he would be tried on the murder charge in the adult criminal justice system and not the juvenile system and that any statements Appellant made could be used against him in the adult system and that he would be facing a possibility of death if he were convicted

[2] It should be noted, Appellant's uncle, Webster Davis, was present during the interrogation (ROA 31). However, the record is barren as to whether Webster Davis was Appellant's legal guardian.

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of the murder charge. See, **Quiriconi v. State**, 96 Nev. 766, 616 P.2d 1111 (1980); and (3) It was error for law enforcement authorities to interrogate Appellant at the North Las Vegas Police Station, an adult facility, rather than at a juvenile facility. See, **A Minor Boy v. State**, 89 Nev. 564, 517 P.2d 183 (1973).

III.

THE DISTRICT COURT JUDGE ERRED IN DENYING APPELLANT AN EVIDENTIARY HEARING ON HIS PETITION FOR POST-CONVICTION RELIEF

As argued previously, many of Appellant's contentions contained factors outside the record, thus, an evidentiary hearing was warranted. Consequently, the District Court Judge erred in denying Appellant's request for an evidentiary hearing in the case sub judice.

This Court has uniformly held that if a post-conviction petition alleges facts which, if true, would entitle the petitioner to relief, the petitioner must be afforded an evidentiary hearing unless the available record repels the petitioner's claims. **Hargrove v. State**, 100 Nev. 498, 686 P.2d 222 (1984); **Hatley v. State**, 100 Nev. 214, 678 P.2d 1160 (1984); **Grodin v. State**, 97 Nev. 454, 634 P.2d (1981); **Doggett v. State**, 91 Nev. 768, 542 P.2d 1066 (1975).

In **Gibbons v. State**, 97 Nev. 520, 634 P.2d 1214 (1981) the Court specifically found that because most claims of ineffective assistance of trial counsel involves question of fact that can only be resolved by the District Court at an evidentiary hearing post conviction relief is the proper remedy. See also, **Bolden v. State**, 99 Nev. 181, 659 P.2d 886 (1983) wherein the Court, after examining the petition and the affidavit of the defendant, determined that an

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evidentiary hearing was necessary. In **Bolden**, **supra**, the court stated:

> "...if a petition for post conviction relief contains allegations which, if true, would entitle the petitioner to relief, an evidentiary hearing thereon is required."

Id. Nev. at 183, 659 P.2d at 886.

Similarly, in **Lewis v. State**, 100 Nev. 456, 686 P.2d 219 (1984) the Court specifically refused to review the effectiveness of counsel on direct appeal, stating "effectiveness of counsel may be reviewed after an evidentiary hearing has been held in which counsel can testify concerning his performance." **Lewis**, 100 Nev. at 461.

Appellant submits it was the legislative intent in enacting NRS 177.315, et seq., that the performance of counsel be tested in an evidentiary setting wherein counsel is able to defend himself concerning the allegations and a defendant is allowed to challenge the actions and performance of counsel. **Accord**, **Gibbons v. State**, **supra**.

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CONCLUSION

Based on the foregoing specification of errors, Appellant submits that his plea of guilty must be set aside as it was not freely and voluntarily given; or his conviction reversed as a

. . .

. . .

. . .

. . .

. . .

. . .

. . .

result of ineffective assistance of counsel; or this matter be remanded in order to conduct an evidentiary hearing.

Respectfully submitted this 6 day of January, 1993.

LAW OFFICES OF CHERRY & BAILUS

By Mark B. Bailus

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AFFIDAVIT OF MAILING

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

PEGGY J. SIGLER, being first duly sworn, deposes and says: That affiant is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interest in, the within action; that on the 16th day of January, 1993, affiant deposited in the Post Office at Las Vegas, Nevada, a copy of the within **APPELLANT'S OPENING BRIEF** enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to:

FRANKIE SUE DEL PAPA, ESQ.
Attorney General
State Mailroom Complex
Las Vegas, NV 89158

REX BELL, ESQ.
District Attorney
200 South Third Street, 7th Floor
Las Vegas, NV 89155

that there is a regular communication by mail between the place of mailing and the place so addressed.

PEGGY J. SIGLER

SUBSCRIBED and SWORN to before me this 16th day of January, 1993.

Notary Public-State Of Nevada
COUNTY OF CLARK
JULIE F. CUNNINGHAM
My Commission Expires
April 10, 1993

NOTARY PUBLIC in and for said County and State.

Theny | Rawlins
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ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * *

FILED

APR 26 1993

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

JIMMIE DAVIS, Appellant, vs. THE STATE OF NEVADA, Respondent.	CASE NO. 23338

APPELLANT'S REPLY BRIEF

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ARGUMENT

I.

APPELLANT'S PLEA OF GUILTY WAS NOT FREELY AND VOLUNTARILY ENTERED, AND THUS, SHOULD BE SET ASIDE

Respondent contends that Appellant freely and voluntarily entered his guilty plea. Respondent relies on **Heffley v. Warden**, 89 Nev. 573, 516 P.2d 1403 (1973), in demonstrating that the Court need not acquire specific phrases in response from the defendant for a plea to be valid. Further, the Respondent contends that the plea hearing requires "only that the record affirmatively disclose that the defendant entered his plea understandingly and voluntarily." Appellant does not dispute this position. Appellant asserts that the record does not disclose that this plea was understood, nor was it voluntary.

In **Heffley**, the defendant did not contest the fact that he understood the nature and consequences of his plea. Heffley appealed because the judge did not specifically mention defendant's waiver of his fifth amendment privilege against self-incrimination before accepting the plea. The **Heffley** Court merely held that the failure to mention one of the constitutional rights alluded to in **Highby v. Sheriff**, 86 Nev. 774, 476 P.2d 959 (1970), does not invalidate a plea where the record supports the determination that the defendant was in fact informed of all his rights, and did in fact enter his plea knowingly and voluntarily. As stated in **Boykin v. Alabama**, 395 U.S 239, 89 S.Ct. 1709 (1969), the record must affirmatively disclose that a defendant who pleaded guilty, entered his plea understandingly and voluntarily. 397 U.S. at 747-748, n. 4, 90 S.Ct. at 1468.

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Subsequently, in **Bryant v. State**, 102 Nev. 268, 721 P.2d 364 (1986), two consolidated appeals challenged guilty pleas. These challenges were based solely as to whether the defendants understood the nature of the charges against them. **Bryant**, 102 Nev. at 268, 721 P.2d at 366. The **Bryant** Court acknowledged that "attacks on guilty pleas are more difficult to dispose of when (the Court is) not able to point to clear and uncontradictory admissions made by the defendant at a plea hearing." 102 Nev. at 270, 721 P.2d at 366.

The **Bryant** Court indicated that a defendant need not express an understanding of every specific element to the crime charged. This was pertinent in **Bryant** because the defendant indicated that he did not understand the specific criminal intent element involved. However, the Court concluded that because the record as a whole revealed that the defendant understood the true nature of the charge against him. The plea would be upheld. 102 Nev. at 273, 721 P.2d at 368.

Moreover, the **Bryant** Court indicated that although the defendant stated that he had discussed the elements of offense with his attorney prior to entering his plea, "this admission standing alone might not be sufficient to infer that Bryant fully understood the nature of the charge against him." Id. When the Court reviewed the record as a whole, the Court was satisfied that the defendant understood the nature of the charge against him. Supporting this contention, the Court indicated that Bryant's counsel argued at the preliminary hearing, where Bryant was present, that the state did not present sufficient evidence to establish that Bryant harbored the requisite criminal intent. Id.

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With the companion case to **Bryant**, co-defendant, Dvorak stated that he was pleading guilty to the charges of the information, and that he was familiar with the information filed against him. This information fully set forth the nature of the offenses to which he was pleading guilty. Id.

II.

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Respondent, in its Answering Brief, indicates that Appellant had effective assistance of counsel under **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052 (1984). Respondent then relies on **United States v. Basley**, 479 F.2d 1124 (5th Cir. 1973), cert. denied, 414 U.S. 924, rehearing denied, 414 U.S. 1052, for the proposition that effective counsel does not mean errorless counsel.

However, Basley consulted with the Court after requesting a dismissal of counsel, whereat he expressed confidence in his appointed counsel and thereafter withdrew his request for dismissal. Id. at 1129. Upon review of all of the circumstances and facts presented before the Court, the Court indicated that the defendant's appointed counsel presented "an adequate defense for a difficult client." Id

Respondent then refers to **Mazzan v. State**, 105 Nev. 745, 783 P.2d 430 (1989) in support of its contention that tactical decisions made by counsel regarding Appellant's case are virtually unchallengeable. However, the **Mazzan** Court stated:

> In deciding an ineffective assistance of counsel claim, a review of Court 'must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, reviewed as of the time of counsel's conduct', and determine whether, in light of all the circumstances, the identified acts or omissions were

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> outside the wide range of professionally competent assistance.

Mazzan, 783 P.2d at 431, citing, **Strickland v. Washington**, 466 U.S. at 690.

Mazzan involved the specific choice of witnesses called in defending the defendant. The Court considered this case based on those specific facts. An additional factor in which the Court considered was that the defendant specifically requested "a repeat performance by counsel who represented him at his trial and first penalty hearing." 783 P.2d at 433.

In dissent, Chief Justice Young, joined Justice Springer, stated that the attorney's failure to present certain witnesses which were highly favorable, without any reasonable explanation for the omission, raised serious doubt as to the competency of the attorney. Further, the prosecution had spent three days presenting evidence in **Mazzan**, yet defendant's attorney called only three witnesses, when several more were available. Chief Justice Young added that the attorney's "misunderstanding of the concept and importance of mitigation resulted in the exclusion of highly favorable character evidence." 783 P.2d at 436. Both Chief Justice Young and Justice Springer found the circumstances of **Mazzan** to result in ineffective assistance of counsel.

Respondent refers to **Marvin v. State**, 95 Nev. 836, 603 P.2d 1056 (1979) to demonstrate that a juvenile has the capacity to make a voluntary confession without the presence or ascent of the parent or guardian. However, in **Marvin**, the Court referred to NRS 62.170(1), which provides, in pertinent part, "When a child is taken into custody the officer shall immediately notify the parent,

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guardian or custodian of the child..." **Marvin** is distinguishable in two different facets of the case. First, the confession, in **Marvin**, was given to the juvenile Court, which the Court noted, has a unique role in that the function of the Court is to determine the best interests of the juvenile and society. 603 P.2d at 1060-1061. Secondly, Marvin's parents were attempted to be contacted, however, they were out-of-town.

Moreover, Respondent also indicates that seeking consent of a responsible adult before questioning is preferable, although not mandatory. For support of this contention, it cites **People v. Davis**, 633 P.2d 186 (Cal. 1981). **Davis** is clearly distinguishable. First, it involves a California case referred to in **Marvin**. Secondly, in **Davis**, the Court found that the evidence attempted to show that the defendant was aware of his rights and not frightened into submission by the police officer. The Court noted, in **Davis**, that "it appears (the defendant) was attempting to use the situation to his own advantage by pretending to cooperate fully and by forthrightfully admitting his contact with the victim on the evening of her death to bolster his credibility in asserting his innocence." Id. at 192. Furthermore, the defendant, in **Davis**, did not want the authorities to contact his parents. The Court found that "the failure to do so under the circumstances of this case did not render the defendant's statement involuntary." Id.

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III.

THE DISTRICT COURT JUDGE ERRED IN DENYING APPELLANT AN EVIDENTIARY HEARING ON HIS PETITION FOR POST-CONVICTION RELIEF

In its Answering Brief, Respondent argues that Appellant is not entitled to an evidentiary hearing in this matter. Respondent cites **Hargrove v. State**, 100 Nev. 498, 686 P.2d 222 (1984) to support its position that Appellant's claims are primarily "bare" or "naked" claims for relief which do not entitle Appellant to withdraw his guilty plea.

In **Hargrove**, the Court held that Hargrove's appeal from an order of the district Court denying his post-conviction to withdraw his plea of guilty was appealable. The defendant had pled guilty to making a bomb threat, but filed a motion for relief based on ineffective assistance of counsel, stating that his plea was the product of his fear of a habitual criminal sentence, and that he was in fact innocent of the charge. The defendant's motion in **Hargrove** was found to be totally unsupported by any specific factual allegations that would have supported a withdrawal of the plea. This motion was unsupported because defendant claimed that certain witnesses could establish his innocence of the bomb threat were not accompanied by witnesses' names or descriptions of their intended testimony. 686 P.2d at 225. In the instant case, however, Appellant's Opening Brief provides witness names and their testimony, which distinguished the instant case from **Hargrove**. Thus, Hargrove's denial of an evidentiary hearing, which was based on the lack of any names of witnesses or their testimony, is clearly in opposite of the facts of this case. Consequently, **Hargrove** does not support the position of Respondent.

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Appellee has also indicated that "this Court has previously held that a defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record." **Grondin v. State**, 97 Nev. 454, 634 P.2d 456 (1981). (Ans.Br. p. 18). **Grondin** also involves a defendant filing a petition for post-conviction relief. **Grondin**'s appeal was also based on ineffective assistance of counsel, as well as a failure to conduct an evidentiary hearing on the merits of his post-conviction relief.

Notably, the **Grondin** Court found that defendant's counsel failed to provide "the required calibre of representation" and thus, remanded the case with instructions that an evidentiary hearing be conducted on the merits of the petition. Id. 634 P.2d at 458. The record indicated that the argument of defendant's attorney at the post-conviction proceeding, that the petition was frivolous, was instrumental in causing the District Court to deny the petition. Additionally, counsel failed to protect the rights of defendant by neglecting to request that an evidentiary hearing be conducted on the merits of the petition. Id. The Court found that "where factual allegations are made which, if true, could establish a right to relief, a convicted person must be allowed an evidentiary hearing on such issue, unless the available record repels such allegations." Id. citing **Fine v. Warden**, 90 Nev. 166, 521 P.2d 374 (1974).

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CONCLUSION

Based on the foregoing, and the specification of errors as contained in Appellant's Opening Brief, Appellant submits his conviction be reversed.

Respectfully submitted this 23rd day of April, 1993.

CHERRY, BAILUS & KELESIS

By Mark B Bailus

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AFFIDAVIT OF MAILING

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

PEGGY J. SIGLER, being first duly sworn, deposes and says: That affiant is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interest in, the within action; that on the 22nd day of April, 1993, affiant deposited in the Post Office at Las Vegas, Nevada, a copy of the within **APPELLANT'S REPLY BRIEF** enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to:

FRANKIE SUE DEL PAPA, ESQ.
Attorney General
State Mailroom Complex
Las Vegas, NV 89158

REX BELL, ESQ.
District Attorney
200 South Third Street, 7th Floor
Las Vegas, NV 89155

SUPREME COURT CLERK
STATE OF NEVADA
Capitol Complex
100 N. Carson Street
Carson City, NV 89701

that there is a regular communication by mail between the place of mailing and the place so addressed.

Peggy J. Sigler
PEGGY J. SIGLER

SUBSCRIBED and SWORN to before me
this 22nd day of April, 1993.

Dolores Masi Laverty
NOTARY PUBLIC in and for said
County and State.

DOLORES MASI LAVERTY
Notary Public - State of Nevada
CLARK COUNTY
My Appointment Expires Aug. 3, 1993

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IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMIE DAVIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 23338

FILED

JAN 24 1995

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court denying appellant's petition for post-conviction relief. On October 12, 1988, appellant appeared before the district court and entered a plea of guilty to one count of first degree murder. In a judgment of conviction entered on December 20, 1989, the district court sentenced appellant to serve a term of life in the Nevada State Prison.

On December 20, 1988, appellant filed in the district court a proper person petition for post-conviction relief, together with a motion for appointment of counsel. The district court appointed counsel. Appellant, through counsel, filed in the district court supplemental points and authorities in support of his petition for post-conviction relief. The state opposed the petition. On April 15, 1992, the district court, without conducting a hearing, entered an order denying appellant's petition. This appeal followed.

Appellant contends that the district court should have set aside his plea because the record does not affirmatively demonstrate that appellant knowingly and voluntarily entered his plea. Appellant contends that the record does not show that appellant understood the elements of the crime of murder. In particular, appellant complains that no one discussed the felony-murder rule with him, and that the rule forms the basis of the state's case against him. Further, appellant complains that the information was never read to him on the record. Appellant's contention lacks merit. Appellant admitted to shooting the victim

and to intending to obtain a gun from the victim without paying for it. A defendant may, as appellant did, enter a valid guilty plea by making a factual admission of guilt. See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986). Such a plea is valid without a canvass by the district court regarding the elements of the charge. Id.

Appellant further contends that the district court erred in determining that his counsel was not ineffective in advising him regarding entry of his plea. Appellant contends that his counsel was ineffective because counsel: (1) did not interview two witnesses to the shooting; (2) did not file pretrial motions seeking to exclude from evidence appellant's statement on the bases that appellant was only sixteen years old when he gave the statement and a parent was not present and that appellant was not advised that he would be tried on the murder charge in the adult criminal system, that any statements made by appellant would be used against him in the adult system, and that he faced a possibility of receiving the death penalty if convicted on the murder charge; and (3) did not seek exclusion of the statement because the police interrogated appellant at the North Las Vegas Police Station rather than a juvenile facility.

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, an appellant must demonstrate that his counsel's performance fell below an objective standard of reasonableness. Further, an appellant must demonstrate a reasonable probability that, but for counsel's errors, appellant would not have pleaded guilty and would have insisted on going to trial. See Hill v. Lockhart, 474 U.S. 52 (1985); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984), cert. denied, 471 U.S. 1004 (1985). Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Strickland v. Washington, 466 U.S. 668, 690-91 (1984).

Appellant has not demonstrated how his counsel's actions fell below an objective standard of reasonableness. Specifically, exclusion of appellant's statement was not warranted, and appellant was not prejudiced because counsel did not file a motion to exclude it. Appellant's uncle went with appellant when appellant gave his statement. Although the uncle may not have been an actual parent or guardian, he clearly was acting in that capacity, with appellant's consent. Moreover, a juvenile has the capacity to make a voluntary confession without the presence or assent of a parent or guardian, and his confession is not involuntary simply because no such adult was present. Marvin v. State, 95 Nev. 836, 840 n.4, 603 P.2d 1056, 1058 (1979). Further, a minor who is charged with murder enters the adult criminal justice system. Such a person is not entitled to the protections of the juvenile system, and the juvenile court never acquires jurisdiction over him. NRS 62.040(1); Shaw v. State, 104 Nev. 100, 753 P.2d 888 (1988). Warning appellant that he was subject to the adult criminal justice system and the penalties in that system is not required. There is every indication that appellant voluntarily gave his statement to the police, knowing he faced serious punishment, and the police did not promise him treatment as a juvenile. Where, as here, the nature of the charges and the identity of the interrogator reflect existence of an unquestionably adversary police atmosphere and the suspect is reasonably mature and sophisticated with regard to the nature of the process, and there is every indication that the statement was given voluntarily, the statement will be admitted. See Quiriconi v. State, 96 Nev. 766, 771, 616 P.2d 1111, 1114 (1980). Finally, it was not improper for the police to interrogate appellant at the North Las Vegas Police Station rather than a juvenile facility because, as mentioned above, appellant's crime involved murder and he was never under the jurisdiction of the juvenile justice system.

Appellant further contends that the district court erred in denying his motion for a hearing on his petition for post-conviction relief. Specifically, appellant contends that a hearing was required because claims of ineffective assistance of counsel involve questions of fact that can only be resolved at an evidentiary hearing.

A petitioner is entitled to an evidentiary hearing if a petition for post-conviction relief alleges facts that, if true, would entitle the petitioner to relief, unless the available record repels the petitioner's claims. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). The witnesses whom appellant contends counsel should have investigated had given statements to the police that inculpated appellant and did not support appellant's proposed theories of the case. Thus, the record does not support appellant's contention that he was prejudiced by counsel's failure to interview these witnesses. Consequently, the district court did not err by refusing to conduct an evidentiary hearing on appellant's petition. See id. Accordingly, appellant's contentions lacking merit, we

ORDER this appeal dismissed.

_____, C. J.
Steffen

_____, J.
Young

_____, J.
Springer

_____, J.
Shearing

_____, J.
Rose

cc: Hon. Gerard J. Bongiovanni, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Stewart L. Bell, District Attorney
Cherry, Bailus & Kelesis
Loretta Bowman, Clerk

Case No. C85078

Dept. No. IV

DOCKET C

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

JIMMIE DAVIS,

Petitioner

v.

WARDEN E.K.McDANIEL,

OF ELY STATE PRISON,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING:
TIME OF HEARING:

9-20-95
0900

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of prisons, name the warden or head of the institution. If you are not in a specific institution of the department but within its custody, name the director of the department of prisons.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you are imprisoned or restrained of your liberty. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

(8) This form is not intended to, and does not, preclude your right to file for post-conviction relief in the district court for the county from which you were convicted in the State of Nevada under the provisions of NRS 177.325. You will be precluded, however, from filing a petition pursuant to chapter 177 of NRS if you do not file it within 1 year after your conviction or decision on appeal and cannot show good cause for failing to file within that time. You are precluded from filing a habeas corpus petition pursuant to chapter 34 of NRS if you do not first challenge your conviction or sentence by filing a petition pursuant to chapter 177 of NRS.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: ELY STATE PRISON, WHITE PINE COUNTY

2. Name and location of court which entered the judgment of conviction under attack: EIGHTH JUDICIAL DISTRICT COURT DEPARTment IV, LAS VEGAS NEVADA

3. Date of judgment of conviction: DECEMBER 12, 1988

4. Case number: C85078

5. (a) Length of sentence: LIFE WITHOUT THE POSSIBLTY OF PAROLE.

(b) If sentence is death, state any date upon which execution is scheduled: X

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this Motion?

Yes _____ No X

If "yes," list crime, case number and sentence being served at this time: X

7. Nature of offense involved in conviction being challenged: FIRST DEGREE MURDER/ROBBERY WITH THE USE.

8. What was your plea? (check one)

(a) Not guily___ (b) Guilty X (c) Nolo contendere___

9. If you entered a guilty plea to one count of an indictment or information, and a not guilty plea to another count of an indictment or information, or if a guilty plea was negotiated, give details: Defendant pleded guilty to first degree murder and stipulate to life without the possibilty of parole in return for the robbry to be dropped

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury_____ (b) Judge without a jury_____

11. Did you testify at the trial? Yes_____ No_____

12. Did you appeal from the judgment of conviction?

Yes_____ No_____

13. If you did appeal, answer the following:

(a) Name of court:_____

(b) Case number or citation:_____

(c) Result:_____

(d) Date of result:_____

(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: